

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 12TH JUNE 2007 / 22ND JYAISHTA 1929

WP(C).No. 12099 of 2004(M)

OS.587/1992 of MUNSIF COURT, KOTTARAKKARA

PETITIONER:

**R. VISWANATHAN NAIR, S/O. RAGHAVAKURUP,
SREE BHAVAN, MARANGATTUKONAM, VALAKAM MURI,
VALAKOM VILLAGE, KOTTARAKKARA TALUK.**

**BY ADV. SRI.T.K.MARTHANDAN UNNITHAN
SRI.K.P.UNNIKRISHNAN**

RESPONDENTS:

- 1. THE STATE OF KERALA, REPRESENTED BY THE
DISTRICT COLLECTOR, KOLLAM.**
- 2. REVENUE DIVISIONAL OFFICER, KOLLAM.**
- 3. MARIYAMMA THARIAN, BUNGLOW PUTHEN
VEEDU, MARANGATTUKONAM, VALAKOM VILLAGE,
KOTTARAKKARA TALUK.**
- 4. THOMAS BABU, NIVADAYIL HOUSE,
MARANGATTUKONAM, VALAKOM VILLAGE,
KOTTARAKKARA TALUK, KOLLAM DISTRICT.**
- 5. T. RAJAN, BUNGLOW PUTHEN VEEDU,
MARANGATTUKONAM, VALAKOM VILLAGE
KOTTARAKKARA TALUK. - (EXPIRED)**
- 6. SUSAMMA THARIAN, DO. DO.**
- 7. MARY THARIAN, DO. DO.**
- 8. ANNI, W/O. THOMAS, NIVADAYIL HOUSE,
MARANGATTUKONAM, VALAKAM VILLAGE,
KOTTARAKKARA TALUK, KOLLAM DISTRICT.**

BY ADV. SRI.ALEX VARGHESE for R4 & R8

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 12/06/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

WPC.NO.12099/2004 M

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE DECREE DTD. 8/11/2002 IN O.S.NO.587/1992 OF THE MUNSIF'S COURT, KOTTARAKKARA.

EXT.P2: COPY OF EXECUTION PETITION EP.NO.81/2003 IN O.S.NO.587/92 DTD. JULY 2003 BEFORE THE MUNSIF'S COURT, KOTTARAKKARA.

EXT.P3: COPY OF ORDER DTD. 16/02/2004 PASSED BY THE MUNSIF'S COURT, KOTTARAKKARA IN E.P.NO.81/2003 IN O.S.NO.587/1992.

EXT.P4: COPY OF WRITTEN STATEMENT DTD. 11/11/1999 IN O.S.NO.587/92 OF THE MUNSIF'S COURT KOTTARAKKARA FILED BY THE 10TH DEFENDANT IN THE SUIT (8TH RESPONDENT HEREIN).

8TH RESPONDENT'S EXHIBITS:

EXT.R8(A): COPY OF SALE DEED NO.3353 DTD. 29/11/1985 EXECUTED BY MARIAMMA IN FAVOUR OF 8TH RESPONDENT.

EXT.R8(B): COPY OF SALE DEED NO.3355 DTD. 29/11/1985 EXECUTED BY MARIAMMA IN FAVOUR OF 8TH RESPONDENT.

/TRUE COPY/

Kss

PIUS C. KURIAKOSE,J.

W.P.(C) No.12099 of 2004

Dated: 12th June, 2007

JUDGMENT

Ext.P3 order of the execution court declining execution against the additional 10th defendant in the suit is under challenge in this Writ Petition under Article 227 of the Constitution instituted by the decree-holder. The suit was one for injunction both prohibitory and mandatory. To begin with there were only two defendants in the suit. Pending suit defendant No.1 died. But additional defendants 5 to 9 were impleaded as legal heirs of defendant No.1. The 10th defendant, an assignee of B schedule property was impleaded on the basis of an application filed by the plaintiff noticing a contention that the property belongs to the 10th defendant. Ext.P1 is the copy of the decree passed in the case and which was sought to be executed before the learned Munsiff. The decree grants a declaration in respect of A schedule property and also a prohibitory injunction in respect of that property. Significantly the decree which is passed in respect of A schedule property is against defendants 1 and 2 alone. The decree grants a mandatory injunction against defendants 1 and 2 in respect of B schedule pathway. Significantly no decree has been passed by the trial court against the additional defendants at all. The reason

obviously is that though impleadment was sought for by the plaintiffs, reliefs were not sought for against the additional defendants. The execution petition was filed by the writ petitioner arraying all the defendants including additional defendants 5 to 9 and additional defendant No.10 on the allegation that the decree of mandatory injunction has been violated. It was contended that there is no decree against additional respondents 5 to 9 and much less against additional respondent No.10. Learned Munsiff by Ext.P3 order after noticing that there was no decree against additional defendants 5 to 10 found that there is distinction between the cases of additional defendant No.10 and the other additional defendants. As regards additional defendant No.10 it was found that she was impleaded on the strength of an assignment deed executed in her favour even prior to the institution of the suit and that no separate relief was sought for against that additional defendant in the suit. But in the case of additional defendant Nos.6 to 9 the execution court noticed that though the plaintiff did not seek amendment of the prayer portion so as to seek relief against those additional defendants, since the decree presently passed is against the 1st defendant and since they are the legal representatives of the 1st defendant the decree is executable

even though there is no decree against them.

2. The additional 10th defendant who is the 8th respondent in the Writ Petition has filed a detailed counter affidavit. Exts.R8(a) and R8(b) are the assignment deeds dated 29th November, 1985 executed in favour of the additional 10th defendant. Exts.R8(a) and R8(b) show that years prior to the institution of the suit she had come to have absolute ownership over the B schedule pathway in respect of which mandatory injunction decree has been passed against defendants 1 and 2. Exts.R8(a) and R8(b) were executed in favour of the additional 10th defendant not by the 1st defendant in the suit, but by Mariyamma, the 1st defendant's predecessor-in-interest. In the written statement filed by the 1st defendant there was no claim either that he was the owner and possession of the disputed property or that he had assigned the property to the 10th defendant. Even the plaintiff-petitioner had no case that the 10th defendant had encroached into the pathway and that was obviously why no relief was claimed by the plaintiff against the 10th defendant who therefore filed only a formal written statement. It is pointed out that the 10th defendant was impleaded in the suit on 9.7.1999. By this time the relief of mandatory injunction in respect of the property belonging to

the 10th defendant had become barred by limitation. Without seeking any relief against the 10th defendant the plaintiff got the suit decreed against the original defendants 1 and 2 alone. The execution petition was filed by the writ petitioner-decree-holder seeking relief against the 10th defendant who was described in the E.P. as a legal representative of the 1st defendant. The petitioner plaintiff purchased A schedule property only in 1988. But, three years prior to that the 10th defendant had become owner of his property having purchased the same from Smt.Mariyamma(a stranger). The petitioner is not entitled to levy execution against the the 10th defendant in the absence of decree against her. In this counter affidavit it is also contended that the decree is in operative and unexecutable as against the 6th defendant also since the 6th defendant is not a legal representative of his father D1. The non-impleadment of the 2nd defendant against whom a decree is passed comes up for criticism in this counter affidavit. It is alleged that the suit was instituted on account of the enmity between the plaintiff and the deceased 1st defendant. Now that the 1st defendant is no more, execution is levied only against the legal heirs of the 1st defendant and against a stranger like D10 as if D10 is also a legal heir of the 1st defendant.

3. Mr.T.K.M.Unnithan, learned counsel for the petitioner addressed me elaborately on all the grounds raised in the writ petition. Learned counsel submitted that the 10th defendant is a party to the decree and since it is seen that he is the person presently in possession of the B schedule property, he is bound to obey the decree. Allowing the impugned order to stand, will result in a situation of the decree being allowed to be disobeyed. The endeavour of the court, according to the learned counsel shall be to ensure that the decree-holder secures the fruits of the decree and that nobody is allowed to violate the decree taking recourse to technical contentions.

4. Mr.Alex Varghese, learned counsel for the 10th defendant-8th respondents on the contrary would submit that the petitioner had not even sought for any relief against the 10th defendant before the trial court. There is no decree against the 10th defendant at all. The 10th defendant had come to own the property, the B schedule pathway years before the institution of the suit. The execution court does not have the jurisdiction to go beyond the decree and therefore the decision not to allow execution against the 10th defendant is not faulty.

5. Having anxiously considered the rival submission addressed

before me, I am of the view that there is no warrant at all for interfering with the decision of the execution court to decline execution against the 10th defendant-8th respondent. The petitioner had not even sought any decree against the 10th defendant before the trial court. The decree granted is Ext.P1 and the same is directed against D1 and D2 alone. Though impleadment of the 10th defendant was sought for by the petitioner as if the 10th defendant is a legal heir of the deceased 1st defendant, it is crystal clear from the documents produced before this court that the 10th defendant had purchased the property long prior to the institution of the suit not from the 1st defendant but from one Mariyamma. The 10th defendant is impleaded long after the relief sought against 1st and 2nd defendants had become barred as against her. As already noticed the decree which was sought for against D1 and D2 and passed against them as decrees of injunction operating in persona. Significantly such decrees were not sought for or granted against the 10th defendant.

6. I am therefore of the view that the execution court was right in declining execution against the 10th defendant. I am passing a separate judgment in W.P.C.No.12094/04 in which I am dealing with the liability of the 6th defendant to obey the decree. I am therefore

not dealing with the liability of the 6th respondent in this judgment.
The challenged against the impugned order fails.

The Writ Petition will stand dismissed. No costs.

srd

PIUS C.KURIAKOSE, JUDGE